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| 10/540,401 | 06/23/2005 | Akihiko Nishio | L9289.05151 | 9722 |
| 52989 | 7590 | 12/29/2009 | | EXAMINER |
| Dickinson Wright PLLC | | | | KHAN, MEHMOOD B |
| James E. Ledbetter, Esq. | | | | |
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

| | | |
|------------------------------|--------------------------------------|--------------------------------------|
| Office Action Summary | Application No. 10/540,401 | Applicant(s) NISHIO ET AL. |
| | Examiner MEHMOOD B. KHAN | Art Unit 2617 |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If no period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED. (35 U.S.C. § 133).

Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) Responsive to communication(s) filed on **18 November 2009**.

2a) This action is FINAL. 2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4) Claim(s) **28-36** is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5) Claim(s) _____ is/are allowed.

6) Claim(s) **28-36** is/are rejected.

7) Claim(s) _____ is/are objected to.

8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All b) Some * c) None of:

1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. _____.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) Notice of References Cited (PTO-892)

2) Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) Information Disclosure Statement(s) (PTO/0256/06)
 Paper No(s)/Mail Date _____

4) Interview Summary (PTO-413)
 Paper No(s)/Mail Date _____

5) Notice of Informal Patent Application

6) Other: _____

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 11/18/2009 has been entered.

Response to Arguments

Applicant's arguments with respect to claims have been considered but are moot in view of the new ground(s) of rejection.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir.

1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claim 29, 35 and 36 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-3 of copending Application No. 12/341306 in view of Hashem et al. (US 20040125743).

Conflicting claims 1 -3, and instant claims 29, 35 and 36 are drawn to generating one channel quality indicator for subcarriers. These claims differ in scope in that the instant claims 29, 35 and 36 are narrower than conflicting claims 1-3.

Conflicting claims 1-3 disclose instant claims 29, 35 and 36 as follows:

Conflicting claim 1. A radio communication apparatus comprising: a channel quality indicator generating section that generates one channel quality indicator representing reception quality of a plurality of subcarriers; and a reporting section that reports the generated one channel quality indicator.

Conflicting claim 2. The radio communication apparatus according to claim 1, wherein the channel quality indicator generating section generates the one channel quality indicator representing the reception quality of a plurality of selected subcarriers.

Conflicting claim 3. The radio communication apparatus according to claim 2, wherein the reporting section reports the generated one channel quality indicator and information about the selected subcarriers.

However, the conflicting claims do not specifically disclose representing an average CQI of the subcarriers.

In an analogous art, Hashem discloses representing an average CQI of the subcarriers (**0020, where Hashem discloses taking average of the S/I's of all the subcarriers**). Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify conflicting application 12/341306 to include using one CQI as taught by Hashem so as to determine a single link mode based on the average quality (**0012**).

This is a provisional obviousness-type double patenting rejection.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 28-36 are rejected under 35 U.S.C. 103(a) as being unpatentable over Frodigh et al. (US 5,726,978 herein Frodigh) in view of Hashem et al. (US 2004/0125743 herein Hashem).

Claim 28, Frodigh discloses a radio communication apparatus (**Fig. 2: 200, 202**) comprising: Frodigh discloses a reception section that receives an orthogonal frequency division multiplex (OFDM) signal (**Col 2: 52-53, where Frodigh discloses OFDM, Col 7: 66, Fig. 3A: 330, where Frodigh discloses a link receiver**); Frodigh discloses a subcarrier selection section that selects a plurality of subcarriers where higher reception quality is measured (**Col 10: 15-36, Fig. 3A: 360, where Frodigh discloses an ACA processor and selection of M subcarriers, Col 7: 29-34, where Frodigh discloses measurement messages on a control channel**); Frodigh discloses a channel quality indicator (CQI) generating section that generates CQI representing the average of the reception quality of all of the plurality of subcarriers selected (**Col 10: 62 – Col 11: 9, where Frodigh discloses averaging the C/I measurements**); Frodigh discloses a reporting section that reports the generated CQI and information indicating the plurality of subcarriers, to a communicating party (**Col 10: 60 through Col 11: 9, where Frodigh discloses sending the results of the measurements, i.e. the averaged result**).

Frodigh does not explicitly disclose wherein: the generated one CQI is a single value.

In an analogous art, Hashem discloses wherein: the generated one CQI is a single value (**0020, 0021, where Hashem discloses taking S/I/s of carriers and averaging the S/I/s to arrive at a single S/I**). Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify Frodigh to

include using one CQI as taught by Hashem so as to determine a single link mode based on the average quality (0012).

Claim 29, Frodigh discloses wherein the subcarrier selection section selects subcarriers of reception quality equal to or higher than a threshold based on reception quality and a threshold decision against a threshold reported from the communicating party (**Fig. 5: step 516, where Frodigh discloses a C/I threshold**).

Claim 30, Frodigh discloses wherein the threshold is controlled adaptively according to an amount of traffic in a cell of the radio communication apparatus and neighboring cells (**Col 10: 30-36, where Frodigh discloses selection of subcarrier based on use of subcarrier in an adjacent channel, it is easily understood by one of ordinary skill in the art that not selecting a subcarrier in use in an adjacent channel will increase C/I**).

Claim 31, Frodigh discloses wherein the subcarrier selection section selects the same number of subcarriers as notified from the communicating party (**Col 10: 19-26, where Frodigh discloses reconfiguring**).

Claim 32, Frodigh discloses wherein the number of subcarriers is controlled adaptively according to an amount of traffic in a cell of the radio communication apparatus and neighboring cells (**Col 12: 40-49, where Frodigh discloses re-assigning of subcarriers**).

Claim 33, Frodigh discloses wherein said subcarrier selection section selects subcarriers from subcarriers restricted beforehand out of all subcarriers (**Col 7: 44-50, where Frodigh discloses number of carriers in the system**).

Claim 34, Frodigh discloses a communication terminal apparatus comprising the radio communication apparatus according to claim 19 (**see Figure 3A, el. 330**).

Claim 35, as analyzed with respect to the limitations as discussed in claim 28.

Claim 36, as analyzed with respect to the limitations as discussed in claim 28. Frodigh discloses a base station apparatus that sends information which becomes a selection criterion of subcarriers, to a communication terminal apparatus (**Fig 4A: 402, 404, where Frodigh discloses a measurement order on available subcarriers**); Frodigh discloses a subcarrier selection section that selects a plurality of subcarriers of higher reception quality based on selection criterion information sent from said base station apparatus (**Fig. 5: 502, 504, 506, 518, 520, where Frodigh discloses receiving measurements deciding on least interfered subcarrier and exchange, a least interfered subcarrier selection results in higher C/I**).

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to MEHMOOD B. KHAN whose telephone number is (571)272-9277. The examiner can normally be reached on Monday - Friday 8:30 am - 5:00 pm. If attempts to reach the examiner by telephone are unsuccessful, the

examiner's supervisor, Lester Kincaid can be reached on 571-272-7922. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/M. B. K./
Examiner, Art Unit 2617

/Lester Kincaid/
Supervisory Patent Examiner, Art Unit 2617